FILE COPY

No. 107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

HAZEL PALMER, et al.,
Petitioners,

vs.

ALLEN C. THOMPSON, Mayor, City of Jackson, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming an order of the United States District Court for the Southern District of Mississippi (Jackson Division) denying injunctive relief to the petitioner, who sought to reopen public swimming facilities closed by the respondents as a result of a Federal Court Order integrating those facilities.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, en banc, has not been reported but is set forth in Appendix A to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on October 9, 1969. Mr. Chief Justice Warren Burger extended the time in which to file this Petition to and including March 8, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I.

Where the City of Jackson, Mississippi, has historically maintained a steel hard, inflexible, undeviating official policy of segregation and where this policy has been manifested, among other ways, by denying blacks access to public swimming facilities provided for whites and where, as a result of legal action brought by black citizens of Jackson, the Federal Court has ordered these facilities to be operated only on an integrated basis, did the City's action in closing these swimming facilities to avoid the integration order violate rights guaranteed the black people of Jackson under the Thirteenth Amendment and Fourteenth Amendment?

II.

Were the rights of the Petitioners to sue guaranteed by 42 U.S.C. §1981 presently infringed and threatened in the future when the City of Jackson closed all its public swimming pools in response to a successful law suit brought by blacks to integrate the facilities with the resultant effect that blacks have lost all public pools and in the future must weigh their constitutional right to integrated public facilities against the possibility that sucessful integration law suits will result in deprivation of the facility?

STATUTORY PROVISION INVOLVED

United States Code, Title 42

§1981. *Equal rights under the law*

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

A federal district court, under the commandment of the Constitution, as well as many opinions from this Court, ordered that public swimming pools which had been racially segregated, be integrated immediately. Instead, the City of Jackson, Mississippi, closed those pools. While the City's rationalization for this action were safety and economic burden, these excuses could only be construed as arising from the disgust and fear felt by white people with regard to close, intimate contact with blacks. The district court and the Fifth Circuit Court of Appeals upheld this action of the City. This Court must decide whether it will permit black Americans to be dealt with in this manner or whether it will fulfill the promise of its prior opinions and of the Civil War Amendments.

This case represents another attempt by the City of Jackson, Mississippi, to avoid integration, perpetuate and encourage segregation and nullify the purposes and requirements of the Civil War Amendments. In 1962, in the case of *Clark v. Thompson,* 206 F. Supp. 539 (S.D. Miss–1962) affirmed, 313 F. 2d. 673 (5 C.C.A.—1963), the federal court, in a declaratory judgment action, ordered that the previously segregated Jackson public swimming pools be integrated. In 1963, as a result of this order, the City of Jackson closed all of its public swimming facilities[1] (Affidavit, Mayor Allen Thompson, Appendix B pp. 76-7).

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[1] Prior to the closing, the City operated:

4 white-only pools; and

1 black-only pool

(Affiffidavit, Carolyn Stevens, Appendix B p. 68).

The evidence established that the pool closings were motivated by racial considerations. *Palmer v. Thompson,* (Appendix A p. 43) (See also concurring opinion, Appendix A p. 46) The City of Jackson asserted that the closing of the pools was in response to the integration order but was necessitated because "the maintenance of law and order would be endangered by operation of public swimming pools on an *integrated basis.* These pools could not be economically operated in that manner." (Emphasis added.) (Affidavit, Mayor Allen Thompson, Appendix B pp. 76-77).

While the details were never spelled out as to increased costs and maintenance of law and order, the reasons were barely below the surface. In Mayor Thompson's Affidavit, Appendix B, he proclaims that many public facilities such as auditoriums, parks and playgrounds have been retained in operation on an integrated basis; but the *pools* were not permitted to remain open on an integrated basis. Why not the pools?

First, Mr. Kurt's Affidavit, Appendix B p. 75, states that the black pool, when segregated earned much less money than the four white pools. He then stated that there will be an economic hardsip inflicted on the City if black swimmers are tolerated in all the pools. This assumes that white attendance at the pools will so drastically diminish that all the pools will lose money. Thus, without ever attempting to operate the pools as integrated and, rather, intending not . . . "to reopen" or operate any of these swimming facilities on an integrated basis, (Affidavit Mayor Allen B. Thompson, Appendix p. 77) the City concluded that its pools would depopulate because of whites fleeing either in disgust or fear of black swimmers.

Furthermore, if five integrated pools lose money there is nothing in the record to indicate that fewer integrated

pools will also represent an unbearable economic burden. The important point is that no attempt was made to comply with the court's order. This only serves to highlight the lack of good faith on the part of the City in registering these excuses.

Next, the City raises the specter of a breakdown of law and order if the pools are permitted to operate on an integrated basis.[2] Here again the justification for closing the pools is more of an insult to the petitioners than the closing itself. In the face of demands by black citizens to integrate, they are told that if their race is permitted to "intermingle" (the phraseology is Mayor Thompson's, Carolyn Stevens, Affidavit, Appendix B), criminality will be produced.

Here again we must wonder as to why the pools cannot indulge integrated activities as distinguished from the auditoriums, parks, and playgrounds. The answer can only be that it is the close bodily contact which is so repulsive to that Mayor. It is this fact, never articulated, which is facilely assumed in every action and position taken by the City with regard to these pools. It is this fact, never articulated in the opinions below, which must be confronted by this Court.

However, the cost and safety pretexts were not clearly thought out, detailed and specifically grounded in any factual basis. The decision of the City to prevent its black and white citizens from co-mingling in the same waters was unqualified in scope. Any doubt that the City intended to maintain the separation of the races in perpetuity was

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[2] In fact, if we are to believe the *Kerner Commission Report*, it is the denial of adequate public facilities (among other things) to black people and exclusion because of racial discrimination which breed violence.

dispelled by the Mayor himself when he confessed that the City Council does not intend to reopen or operate any of these swimming facilities on an integrated basis (Affidavit, Mayor Allen Thompson, Appendix B p. 77).

The fact that the City chose to justify the closing of the pools on grounds of cost and safety was merely an attempt to mask the real motivation for the closing: racism. This can be seen most obviously from the uncontradicted Affidavit filed by Carolyn Stevens, Appendix pp. 69, 70, 72, 73. In that Affidavit, the City's opposition to integrating the pools is documented by statements of public officials of the City and the State of Mississippi. These statements, which were never contradicted, are set forth as follows:

> "'We will do all right this year at the swimming pools,' the Mayor noted. 'but if these agitators keep up their pressure, we would have five colored swimming pools because *we are not going to have any intermingling.* . . . .' He said the City now has legislative authority to sell the pools or close them down if they can't be sold."
>
> *Jackson Daily News,* May 24, 1962, Page 1. Quoting Mayor Allen Thompson (Emphasis added)

> Moreover, Ross Barnett today commended Mayor Thompson for his pledge to maintain Jackson's present separation of the races.
>
> *Jackson Daily News,* May 15, 1963, Page 1.

> Thompson said neither agitators nor President Kennedy will change the determination of Jackson to retain segregation.
>
> *Jackson Daily News,* May 24, 1963. Page 1.

Indeed, it was not the maintenance of integrated public pools but rather their closing which endangered public

safety. After the closing, children, particularly black children, in seeking bathing facilities, found it necessary to swim without supervision in local streams. At the time this action was commenced, at least two black children had been drowned while swimming in Pearl River (Affidavit, Carolyn Stevens, Appendix B p. 71).

In upholding the City's claim that the pools could not be economically operated on an integrated basis, the majority observed that the pools never were operated at a profit. However, it failed to explain why the City was prepared to operate at a loss on a segregated basis, but was fearful of some greater loss margin on an integrated basis. What the additional cost of integration was to be was never specified. Why it would require closing *all* the pools was never detailed. For example, there is no explanation why it would be more costly to maintain the pools which had been previously all black on an integrated basis.

Furthermore, while the majority opinion at least recited the cost of maintenance of the pools (as segregated facilities), no costs were submitted on the maintenance of park benches and washrooms in the municipal building. Yet, when these facilities were ordered integrated, the benches were removed and the washrooms nailed shut (Affidavit, Mayor Allen C. Thompson, Appendix B pp. 77-78).

The first law suit regarding these matters demanded that the pools be integrated. *Clark v. Thompson, supra.* It was then that the pools were closed. After the pools were closed, petitioners filed a complaint seeking a temporary and permanent injunction requiring the City to reopen the pools on an integrated and equal basis. This relief was denied by the United States District Court for the Southern District of Mississippi. The District Court's denial was affirmed by a three-judge panel of the Fifth Circuit Court of Appeals.

Rehearing was granted before the Fifth Circuit Court of Appeals, en banc. The decision of the District Court was affirmed by seven judges, six judges dissenting with Judge Wisdom writing for the dissenters.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW DENIES TO THE BLACK CITIZENS OF JACKSON, MISSISSIPPI, THE RIGHTS GUARANTEED THEM BY THE THIRTEENTH AMENDMENT AND APPROVES AN OFFICIAL POLICY WHICH PERPETUATES THE BADGES AND VESTIGES OF SLAVERY BY DENYING BLACKS INTEGRATED SWIMMING FACILITIES AND THEREBY OFFICIALLY PROCLAIMING PERSONAL AND RACIAL DISGUST FOR YOUR PETITIONERS.

The purpose and object of the Thirteenth Amendment was to establish "universal freedom" for black people and rid them of all vestiges and badges of slavery:

> No one can fail to be impressed with one pervading purpose found in all the amendments, laying at the foundation of each, and without which none of them would have been suggested; we mean freedom of the slave race, the security and firm establishment of that freedom and the protection of the newly made freeman and citizen from oppresion of those who formerly exercised unlimited dominion over them.
>
> *Slaughter House Cases,* 16 Wall. 36, 71 (83 U.S., XXI, 394)

In the *Civil Rights Cases,* 109 U.S. 3 (1875), the majority not only reasserted that the Thirteenth Amendment established and decreed "universal civil and political freedom" but held that the amendment was self-executing and prohibited a state from imposing badges of slavery:

> In a very able and learned presentation of the cognate question as to the extent of the rights, privileges, and immunities of citizens which cannot rightfully be abridged by state laws under the fourteenth amendment, made in a former case, a long list of burdens and disabilities of a servile character, incident to feudal vassalage in France, and which were abolished by the decrees of the national assembly was presented for the purpose of showing that all inequalities and observances enacted by one man from another, were servitudes or badges of slavery, which a great nation, in its effort to establish universal liberty, made haste to wipe out and destroy. But these were servitudes imposed by the old law, or by long custom which had the force of law, and exacted by one man from another without the latter's consent. *Should any such servitudes be imposed by a state law, there can be no doubt that the law would be repugnant to the fourteenth, no less than to the thirteenth amendment;* nor any greater doubt that congress has adequate power to forbid any such servitude from being exacted.
>
> *Civil Rights Cases, supra,* at 21 (Emphasis added)

Recently, this Court again examining the Thirteenth Amendment, said:

> "By its own unaided force and effect," the Thirteenth Amendment "abolishes slavery and establishes universal freedom." *Civil Rights Cases,* 109 U.S. 3, 20, 3 S. Ct. 18, 28. Whether or not the Amendment *itself* did any more than that—a question not involved in this case— it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more.
>
> *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 439 (1968).

Jones raised the question as to whether the Thirteenth Amendment by its own force, as distinguished from Congressional enactments thereunder, forbids any action which maintains the badges and vestiges of slavery. It did not answer the question. In this case, petitioners raise the question again and in this manner: Did the City of Jackson infringe on the promise of "universal freedom" guaranteed to black people by the Thirteenth Amendment when the City, motivated by the desire to avoid integration. closed all its segregated swimming pools rather than integrate them as ordered by the federal court? Petitioners do not assert, for purposes of this argument that the Action of the City violated any federal statute but only that the closing of the pools violated the Thirteenth Amendment.

There is no doubt that the City's action in closing the pools was racially motivated. All the judges on the Fifth Circuit Court sitting en banc found that the closings were racially motivated. *Palmer v. Thompson, supra,* (Appendix A p. 43); concurring opinion (Appendix A p. 46). However, the majority concluded that racial motivation could not be considered in adjudging a denial of a constitutional right. The majority opinion cited *Hirabayashi v. U. S.,* 320 U.S. 81, 100 (1943); *Shuttlesworth v. Birmingham Board of Education,* 162 F. Supp. 372, 379-381, (N.D. Ala. S.D. 1958) affirmed 358 U.S. 101 (1958); and *Brooks v. Beto,* 366 F. 2d. 1, 25 (5 C.C.A., 1966), in support of this proposition. However, the majority's reliance on these decisions in this case is unsound.[3]

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[3] In *Hirabayashi,* the Court, in an unheralded opinion and in an era of war time psychology, decided that the War Power established, for the purpose of preventive action, the right of the federal government to take Japanese ancestry into consideration; and that such action was not banned by the Fifth Amendment. However, since the war this

(Continued on next page)

For example, in *Brooks, supra,* the State of Texas, in order to provide a fair and representative cross-section of grand jurors, intentionally sought to select a percentage of the black population to be included in a group from which the jurors would be randomly selected. The Fifth Circuit in *Brooks, supra,* approved the system quoting from Judge Sobeloff in *Wanner v. Arlington County School Board,* 357 F. 2d 452 (4 C.C.A., 1966):

> If a school board is constitutionally forbidden to institute a system of racial segregation by the use of artificial boundary lines, it is likewise forbidden to perpetuate a system that has been so in-

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(Continued from preceding page)

case has never been cited for the proposition that race or national origin affords an appropriate method for singling out groups for purposes of governmental acts. On the contrary, *Hirabayashi* has been cited by the court for this basic postulate of constitutional law: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi, supra,* at 100. See: *Oyana v. State of California,* 332 U.S. 633, 645-646 (1947); *Hernandez v. State of Texas,* 347 U.S. 475, 478 (1954).

Nor is *Shuttlesworth* authority for the proposition that a showing of racial motivation alone is insufficient to invalidate a racially motivated governmental action. For in that case, while the three-judge panel refused to find a school placement law to be unconstitutional on its face, it did so because it refused to assume, without evidence, that the State was "racially motivated" in adopting the legislation. Because of the lengthy discussion of motivation, the assumption must be that had racial motivation been proven, the result of that case would have been different. *Shuttlesworth, supra,* at 38.

Since the majjority, the concurring opinion, and the dissenters in the present case acknowledge the racial motivation in the City's actions, the teaching of *Griffin v. County School Board of Prince Edward County,* 377 U.S. 218, 231 (1934) cannot be avoided:

> Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional.

> stituted. It would be stultifying to hold that a board may not move to undo arrangements artificially contrived to effect or maintain segregation on the grounds that this interference would involve "considerations of race" When school authorities, recognizing the historical fact that existing conditions are based on a design to segregate the races, acts to undo these illegal conditions—especially conditions which have been judicially condemned—their effort is not to be frustrated on the grounds that race is not a permissible consideration. This is not the "consideration of race" which the Constitution discountenances.
>
> *Brooks v. Beto, supra,* at 25.

Unlike the State of Texas in *Brooks,* the City of Jackson was not seeking to "undo" the long standing pattern of segregating swimming pools, but rather to "perpetuate a system" which forbids black to swim with whites and such action is "constitutionally forbidden".

Petitioner finds no creditable authority for the proposition that the City of Jackson's clear racial motivation in closing the pools is not violative of the Constitution. Indeed, this Court has held that "racial motivation" in the refusal to sell real estate is impermissible because it violates federal statutes authorized by the Thirteenth Amendment:

> Indeed, even the respondents seem to concede that if Section 1982 (42 U.S.C.) "means what it says"—to use the words of the respondent's brief—then it must encompass *every racially motivated* refusal to sell or rent and cannot be confined to officially sanctioned segregation in housing. • • • Our examination of the relevant history, however, persuades us that Congress meant exactly what it said. (Emphasis added.)
>
> *Jones v. Mayer, supra,* at 421-422.

A private citizen may not be racially motivated in selling his property because such motivation constitutes a restraint upon "those fundamental rights which are the essence of civil freedom." *Jones, supra*, 441. Surely the same motive is impermissible when the City of Jackson denies blacks access to public swimming pools.

The majority opinion below, while finding that the City was racially motivated in closing the pools, accepted as a constitutionally permissible justification for that action the City's assertion that closing of the pools was necessary because integration would: (1) affect personal safety; and (2) affect the economical operation of the pools.[4] However, this Court has held that the threat of violence does not constitute a basis for avoiding the requirements of the Constitution:

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[4] It should be noted that the pools never did operate profitably.

Moreover, the majority opinion of the Firth Circuit Court of Appeals suggests that somehow the City's action in closing the pools may be countenanced because pools are not an essential public function. (Appendix A pp. 38-39). But the Thirteenth Amendment has never been interpreted to mean that a state may maintain the badges of slavery in non-essential functions.

In searching for justification of the City's action in closing the pools, the majority alludes to the proposition that the city was merely seeking some time in "easing the transition from an unconstitutional mode of operation to one that is permissible" (Appendix A pp. 38-39). However, 16 years have elapsed since *Brown* and the time for "deliberate speed" has passed. *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969). Even if the City's closing of the pools could be justified on the basis that this action was taken for purposes of easing the transition of operation of the pools from a segregated to an integrated basis, the facts do not justify such a conclusion, for, as asserted by the City and found by the majority:

> (T)he City thereby decided not to offer that type of recreational facility to any of its citizens and it has not done so and does not intend to reopen any of said pools (Appendix A pp. 37, 43-44).

> Desirable as this is (public peace) and important as is the preservation of the public peace, this aim cannot be accomplished by law or ordinances which deny rights created or protected by the federal Constitution.
>
> *Buchanan v. Warley,* 245 U.S. 60, 81 (1917); *Cooper v. Aaron,* 358 U.S. 1 (1958)

Moreover, this Court has not allowed the financial cost of integration to be employed as a barrier permitting racial discrimination. *Griffin v. County School Board of Prince Edward County,* 377 U.S. 218, 233, (1964). Thus, the City's racial motivation in closing the pools cannot be constitutionally justified by the excuses that integration would adversely affect the public safety and is not economical.

The closing of the pools, motivated as it was by race, cannot stand the test of the Thirteenth Amendment. This action returns black people to the days of the infamous *Dred Scott v. Sanford* decision, (60 U.S. (19 How.) 393) (1856), which proclaimed that black peoples "wear the mark of inferiority and degradation" (416) so that they would always be "identified in the public mind with the race to which they belonged" (411)—one which was "inferior and degraded." (413-416). It was against this legal backdrop that the Thirteenth Amendment was adopted.

Even though the majority in the *Civil Rights Cases* and *Plessy v. Ferguson,* 163 U.S. 537 (1896) chose to adopt an artificial and discredited distinction between the Civil War Amendments application to "social rights," as distinguished from legal rights, *Strauder v. State of West Virginia,* 100 U.S. 664 (1879); *Ex parte Virginia,* 100 U.S. 667 (1880), this Court did assert that the Thirteenth Amendment by its own force and without legislation established "universal freedom" and abolished all servitude and badges thereof.

Plessy and its distinctions are discredited. *Brown v. Board of Education*, 347 U.S. 483 (1954). The Thirteenth Amendment is no longer a dead letter. *Jones, supra*, and *Sullivan v. Little Huntington Park, Inc.*, 396 U.S. 229 (1969).

What the City of Jackson has proclaimed in its action of closing the pools is its marked dislike for black people: i.e., in response to a class action by black citizens seeking integration of the pools, the City has chosen to deprive everyone of the right to use the pools rather than to subject whites to what it considers impermissible—contact with blacks. It is difficult to imagine a more deliberate affront to the guarantee of "universal freedom" for blacks or a more insulting continuation of the badges of slavery prohibited by the Thirteenth Amendment.

To close the pools, rather than to integrate them, could have no less effect upon blacks than separation of blacks and whites in public schools. It would likewise "generate(s) a feeling of inferiority as to their state in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown, supra, at 494.* In Jackson, blacks never did, do not now, and are unlikely in the foreseeable future to swim with whites in public swimming pools. This "arbitrary separation of the citizens on the basis of race . . . is a badge of servitude wholly inconsistent with the civil freedoms and the equality before the law established by the Constitution." *Plessy, supra*, J. Harlan dissenting at 562.

It is indeed ironic that the logical conclusion of this Court's opinion in *Brown* is that black citizens of the City of Jackson now have no swimming facilities whereas, prior to the integration order, there was at least one segregated pool available. (c.f. *Evans v. Abney*, 396 U.S. , 90 S. Ct.

628 (1970). Thus, the doctrine of integration promoted and promulgated by this Court has become enlisted in the strategy of the respondents to deprive the petitioners of *any* swimming facilities. What this Court must decide is whether it will permit its opinions to be used in such a way.

2. THE DECISION OF A MAJORITY OF JUDGES ON THE FIFTH CIRCUIT COURT OF APPEALS PERMITTING THE CITY OF JACKSON TO CLOSE ITS POOLS RATHER THAN INTEGRATE THEM HAS THE EFFECT OF NULLIFYING THE PURPOSES OF THE FOURTEENTH AMENDMENT BECAUSE IT RESTRICTS BLACK PEOPLE TO A SYSTEM WHEREBY ACCESS TO ANY PUBLIC FACILITY MAY BE DENIED SOLELY ON ACCOUNT OF THE RACE.

It is the City's claim that the "equal protection" clause is satisfied because both blacks and whites now find that the public pools are equally unavailable to them.[5] This claim, approved by the District Court and a majority of judges on the Fifth Circuit, nullifies the purpose of the Fourteenth Amendment and subverts the decisions of this Court in dealing with the Amendment. *Brown v. Board of Education, supra.* Blacks who had been degraded by slavery, called chattels by the *Dred Scott* court, and systematically excluded from white society, had every right to believe that the *Brown, supra,* decision enhanced their claim to becoming a part of a free society. Yet, as a majority of judges on the Fifth Circuit would have it, *Brown* means that while blacks have the right to integrate existing public facilities they are powerless when these same facilities are

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[5] At least one private pool is operated on a "white-only" basis. This occurred as a result of the City returning a leased pool (Leavel Wood) to the Y.M.C.A. at the same time all the other pools were closed. Affidavit, Carolyn Stevens. Appendix p. 70.

closed because they sought to integrate them. What this means is that blacks may be forced to endure one of two unacceptable results: Not seek integration and thus have the use of a facility on a segregated basis, or seek to integrate a facility and risk that the facility will be closed because they have attempted to integrate it. Such an anomaly denies the promise of "freedom" established in the Civil War Amendments and result in "invidious discrimination" against them.

The majority opinion below asserts that closing the pools *affects* both black and white equally. This assertion overlooks the whole history of racial discrimination in this country and is fundamentally incorrect, for it assumes that black and white people start off equally. As far back as 1879, the court recognized that the mere assertion that blacks and whites are equal does not establish equality:

> At the time when they were incorporated (War Time Amendments) into the Constitution, it required little knowledge of human creatures to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that state laws might be used to perpetuate the distinctions that had before existed. Discrimination against them had been habitual. It was well known that, in some states, laws making such discrimination then existed, and others might be expected. The colored race, as a race, was subject and ignorant, and in that condition unfit to command the respect of those who had superior intelligence. Their training had left them mere children, and as such, they need the protection which a wise government extends to those unable to protect themselves. They especially needed protection against unfriendly action in states where they were residents. It was in view

> of these considerations the Fourteenth Amendment was framed and adopted.
>
> *Strauder, supra,* at 665

But, when the court in *Plessy, supra,* turned away from *Strauder,* and Justice Harlan, dissenting, foresaw the inevitable result:

> The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and initiating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat beneficient purposes which the people of the United States had in view when they adopted the recent amendments to the constitution, by one of which blacks of this country were made citizens of the United States. . . . The destinies of the two races in this country, are indissololubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, then state enactments which, in fact, proceed on the grounds that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?
>
> *Plessy, supra,* at 560

What Justice Harlan so accurately predicted would be the result of the "separate but equal doctrine"[8] is also the

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[8] The Jackson swimming pool situation is a good example of the causative relationship between the separate but equal doctrine and the perpetuation of "distrust between the races," While the population of the City of Jackson is 2/3 white and 1/3 black, of the five public pools in operation on a segregated basis, only one was for the use of black people. (Affidavit, Carolyn Stevens, Appendix B p. 68).

inevitable result of the doctrine of achievement of equality by the use of facilities as "equally unavailable" announced by the majority below.[7]

Since *Brown, supra,* this court on numerous occasions has struck down attempts to encourage or perpetuate segregation despite the fact that the actions taken, on their face, appeared to apply equally to all races. In *Griffin v. County School Board of Prince Edward County, supra,* the county, motivated by the intention of circumventing a desegregation order, closed all of its schools. This court, in ordering the reopening of the schools, held that the county's objective in closing the schools could never be constitutional where it was based on "grounds of race and opposition to desegregation." *Griffin, supra,* at 231.

In *Reitman v. Mulkey,* 387 U.S. 369 (1967), this court affirmed a decision of the California Constitution repealing open housing laws. The amendment, on its face, applied equally to all citizens of California. In affirming the California Court's decision this Court affirmed a three-pronged test employed by the California Supreme Court to determine the amendments validity under the Fourteenth Amendment. The test involved the following factors:

1. "The historical context and conditions" existing prior to the enactment,
2. "Immediate objective" of the action and
3. "Ultimate effect" of the action.

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[7] To speak of this law (closing the schools and providing tuition grants for students attending private schools) as operating equally is to equate equal protection with the equality Anatole France spoke of: The law "in its majestic equality, forbids rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."

Hull v. St. Helena Parish School Board, 197 F. Supp. 649, 655 (E.D. La — 1961) affirmed 368 U.S. 515 (1962).

In this case, the City of Jackson, historically, has encouraged and perpetuated segregation. The City's objective in closing the pools was to avoid the desegregation order. The effect was to deprive blacks of all swimming facilities.[8]

In *Anderson v. Martin*, 375 U.S. 399 (1964), the Court held that placing racial designations on voting ballots violated the Fourteenth Amendment. The State of Louisiana argued that these designations applied equally to both white and black candidates. The Court, in rejecting this argument, stated:

> Obviously, Louisiana may not bar Negro citizens from offering themselves as candidates for public office, nor can it *encourage* its citizens to vote for a candidate solely on account of race.
>
> • • • • •
>
> Race is a factor upon which the statute operates and its involvement promotes the ultimate discrimination which is sufficient to make it invalid.
>
> *Anderson, supra, at 404* (Emphasis added).

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[8] The majority of the Fifth Circuit Judges sought to distinguish the case at bar from *Reitman* because California previously had an open housing law and the constitutional amendment there would involve the State in regressing from that law and encouraging private discrimination. Whereas, here there had been no previous attempt by the City to regulate private actions of racial discrimination. *Palmer v. Thompson* (Appendix A. p. 40). It makes no legal sense to condemn regression from a position improving race relations because it encouraged racial discrimination and approve the City of Jackson's continuation of a policy of racial separation which is the obvious result of closing the pools.

The majority also attempted to distinguish *Reitman* from this case by stating: "It is significant further that the subject facilities here, public in nature, have ceased to exist whereas the private facilities in *Reitman*, by their very identity and nature of necessity continue to exist." *Palmer v. Thompson* (Appendix A p. 40). But, these pools exist in their closed state as silent monuments to a system which holds blacks to be inferior and degraded.

In *Loving v. Commonwealth of Virginia,* 388 U.S. 1 (1966), the Virginia miscegenation statute was ruled unconstitutional. There again the "equal" application argument was urged by the State and rejected by the Court:

> Because we reject the notion that mere 'equal application' of a statute containing racial classifications is enough to remove the classification from the Fourteenth Amendment's proscription of all invidious racial discrimination, we do not accept the State's contention that these statutes should be upheld if there is any possible basis for concluding they serve a rational purpose.
>
> • • • • •
>
> The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.
>
> *Loving, supra,* p. 8 and 10. (Citing *Strauder, supra,* and *Ex Parte Virginia, supra)*

When the principles of *Anderson* and *Loving* are applied to this case, it becomes evident that the closing of the pools violates the Fourteenth Amendment. Despite the fact that the poles are "equally" unavailable to whites and blacks, it is undisputed that the closing of the pools was motivated by a lawsuit, a class action, brought by black citizens to obtain equally *open* facilities. To characterize the City's action as "equal" in any sense, is insulting. The closing was racially discriminatory in that it was a reaction to the demands of black citizens. The City would never acted as it did if the citizens who were making these demands had not been black.

In all of the aforementioned cases which reject the excuse of "equal application," the rationale has been that the action taken by the state or local government permitted

them to officially foster and encourage racism. The same rationale applies in this case. What the City of Jackson has accomplished by closing the pools is that it has taken this dramatic opportunity to tell its citizens that racial integration is so unsafe that public facilities should waste and wither in preference to racial integration; and, that integration is so evil that it will not in the future "reopen or operate these pools on an integrated basis."

Nor is the case of *Evans v. Abney, supra,* in point. In that case the court held merely that inherited land would revert to next of kin when one testator has required that a public gift be officially segregated. In this case there was no testament or property interest which demanded segregation in the pools. Thus, there is no constitutional restriction on their being operated as integrated facilities. In fact, in *Evans, supra,* the court spoke of the kind of situation involved herein:

> A second argument for petitioners stresses the similarities between this case and the case in which a city holds an absolute fee simple title to public park and then closes that part of its own accord solely to avoid the effect of a prior court order directing that the park be integrated as the Fourteenth Amendment commands Yet, assuming *arguendo* that the closing of the park would in those circumstances violate the Equal Protection Clause, that case would be clearly distinguishable from the case at bar because there it is the State and not a private party which is injecting the racially discriminatory motivation.
>
> *Evans v. Abney,* 90 S. Ct. 633.

It has never been a defense to wrongful acts that the undoing of them would be difficult or costly. The City of Jackson has historically created a system of racial dis-

crimination which has fostered a climate of hatred, prejudice and distrust. It should not be able to assert that the very climate it created justifies the City's denial of constitutional rights to blacks. *Cooper v. Aaron, supra.*

The implications of the City of Jackson's action were clearly stated by Judge Wisdom in his dissenting opinion:

> We should not be misled by the equal-application argument. That argument smacks of the repudiated separate-but-equal doctrine of *Plessy v. Ferguson.* We should not be misled by focusing on the city' non-operation of the pools. Closing the pools as an official act to prevent Negroes from enjoying equal status with whites constituted the unlawful state action. It has the same purpose and many of the same effects as maintaining separate pools.
>
> We should recognize the actual traumatic impact of the action on Negroes for what it was. It was a reaffirmation of the Dred Scott article of faith that Negroes are indeed "a subordinate or inferior class of beings, who had been subjugated by the dominant race" and are not members of the "people of the United States." This is the badge of servitude, the sign of second-class citizenship, the stigma that the Thirteenth, Fourteenth and Fifteenth Amendments were designed to eradicate. (Wisdom, Dissent—Appendix A, p. 64.)

3. WHEN THE OPINION BELOW APPROVED THE CLOSING OF THE POOLS WHEREBY THE PETITIONERS WERE DEPRIVED OF FACILITIES WHICH HAD PREVIOUSLY BEEN AVAILABLE ON A SEGREGATED BASIS, IT PERMITTED SANCTIONS TO BE IMPOSED UPON THE PETITIONERS BECAUSE THEY COMMENCED AN INTEGRATION LAWSUIT AND VIOLATED RIGHTS GUARANTEED UNDER 42 U.S.C. §1981.

The Civil Rights Act of 1866 guarantees to all citizens the right to use the legal system of this nation in the same way "as is enjoyed by white citizens." 42 U.S.C. §1981. In this case, the response of the defendant to the petitioners' search for justice in the court was to deny them any swimming facilities whatsoever. Thus, the defendant sought to punish the plaintiffs for going into court at all.

This is no different than what was condemned by this court in *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964). In that case, the court "emphasized the precise terms of §203(c) that prohibit any attempt to punish persons for exercising rights of equality conferred upon them by the Act." *State of Georgia v. Rachel*, 384 U.S. 780, 804 (1966). The "attempt to punish" condemned in *Hamm* (and, indirectly, in *Rachel*) was not the ultimate possibility of a conviction but rather the harassing tactic of the prosecution itself. Thus, the fact that the government employed sanctions against persons for the legitimate exercise of rights guaranteed under a federal statute is sufficient to invalidate those sanctions.

The same is true in this case. Sanctions were imposed upon these petitioners. They were deprived of all swimming facilities which they had previously enjoyed. The sanctions were imposed for the exercise of a legitimate right: The petitioners legitimately and rightly sought re-

dress in court from segregation and it was in response to the court's integration order that the sanction, described above, was imposed. Not only were the petitioners acting legitimately, their actions were specifically pursuant to a federal statute, 42 U.S.C. 1981, which specifically guarantees to these petitioners the same availability to the courthouse as is enjoyed by white people.

When the Congress of 1866 passed this Statute it extended to blacks the protective mantle of a federal statute which protected black people who sought the aid of the judicial system and the City of Jackson cannot be permitted to destroy this right.

The action of the City of Jackson in closing the swimming pools in response to a federal court order integrating them is also violative of Section 1981 in that it may effect further decisions of blacks to seek redress in courts. To seek redress in the courts for purposes of obtaining integration, plaintiffs must decide whether the risk created by a successful law suit—the city closing the facility—is worth the benefit of their right to sue.

In a situation where union members have been guaranteed the right to sue their union under Labor Management Reporting and Disclosure Act (L.M.R.D.A.), 29 U.S.C. §441(a) (4), federal courts have held that a union constitution was invalid when it forced the members to hazzard membership rights because they brought legal action. For example, in *Ryan v. International Brotherhood of Electrical Workers*, 361 F. 2d. 942 (7 C.C.A., 1966) cert. den. 385 U.S. 936 (1966), the defendant's constitution required that a member exhaust internal remedies prior to instituting legal action. Subsequent to a federal court decision holding that plaintiffs had not properly exhausted their remedies, the plaintiffs were expelled. The court found that the effect

of the union's constitution providing for exhaustion violated the "right to sue" provision of the L.M.R.D.A.:

> This claim of the union . . . makes a member's bringing suit against a union or its officers too chancy a gamble for the member and effectually blocks access to the courts by placing the member in a dilemma of swallowing the grievance . . . or suing upon the speculation that he will be safe from expulsion by the court's discretion (that there was no need to exhaust) being exercised in his favor.
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> *Ryan, supra,* at 946; cf. *Retail Clerks Union v. Retail Clerks Int. Ass'n.,* 299 F. Supp. 1012 (D. C., 1969)

If Congress in granting new rights to union members did not intend that they be exposed to loss of membership as a risk of bringing a law suit, then §1981, which created new rights for black people to seek justice in the courts, should likewise be held to bar a city from subjecting black plaintiffs to the risk of losing recreational facilities because they successfully sought the court's assistance in obtaining integration. The City's action in closing the pools places black people in a dilemma not unlike and no more permissible than the one encountered by the union members in *Ryan.* Blacks must either "swallow their grievance" or "speculate" as to whether, if they obtain judicial relief, the subject facility will be eliminated. This dilemma, if condoned, will effectively bar black citizens from access to the courts and deny them the right to sue guaranteed by Section 1981.

No rationalizing of motives, such as that engaged in by the majority below, can obscure the stamp of inferiority placed on black citizens by the action of the City of Jackson. Yet, sadly, that action merely teaches your petitioners

a lesson that they have been suffered to learn since they were brought to this country as slaves. This controversy raises the question whether black citizens will be taught an ever harsher lesson—that should they take their grievances to the federal judiciary for redress, their struggle for equality will be set back further than if they had not sought judicial remedy at all. Therefore, this Court is presented not only with the question whether petitioners' dream may be realized but also whether the federal courts will be an effective arena in which the process of that realization will be furthered.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

GOODMAN, EDEN, ROBB, MILLENDER, GOODMAN & BEDROSIAN
Ernest Goodman
Paul A. Rosen
William H. Goodman
By: Ernest Goodman

LAW CENTER FOR CONSTITUTIONAL RIGHTS
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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

October Term, 1966

No. 23841

D.C. Docket No. CA 3790

HAZEL PALMER, ET AL.,
Appellants,

versus

ALLEN C. THOMPSON, Mayor,
City of Jackson, Et Al.,
Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

Before Rives, Coleman and Godbold, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Dis-

trict Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Hazel Palmer, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

August 29, 1967

Issued as Mandate: Sept. 20, 1967

In The
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

(Filed Oct. 25, 1967)

No. 23841

Hazel Palmer, et al,
Appellants,

versus

Allen C. Thompson, Mayor,
City of Jackson, et al,
Appellees.

ORDER GRANTING REHEARING, EN BANC

Appeal from the United States District Court for the Southern District of Mississippi

Before: Brown, Chief Judge; Tuttle, Wisdom, Gewin, Bell, Thornberry, Coleman, Goldberg, Ainsworth, Godbold, Dyer and Simpson, Circuit Judges.

By the Court:

The Court on its own motion having determined to rehear this case en banc,

It is ordered that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

October Term, 1967

No. 23841

D.C. Docket No. CA 3790

Hazel Palmer, et al.,
Appellants,

versus

Allen C. Thompson, Mayor,
City of Jackson, et al,
Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

Before: Brown, Chief Judge; Rives, Tuttle, Wisdom, Gewin, Bell, Thornberry, Coleman, Goldberg, Ainsworth, Godbold, Dyer and Simpson, Circuit Judges.*

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* Judge Clayton, now deceased, participated in the decision of this case and expressed his written concurrence in the opinion and decision on February 5, 1968, prior to his illness which disabled him from any further participation or action.

JUDGMENT ON REHEARING, EN BANC

This cause came on to be heard on rehearing en banc with oral argument;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the panel of this Court is affirmed.

Chief Judge Brown; Judges Tuttle, Wisdom, Thornberry, Goldberg, and Simpson, dissent reserving the right to file a dissenting opinion.

Judges Gewin, Coleman, Ainsworth, Goldberg and Dyer, concur.

Judge Bell concurs in the result and specially reserving the right to file a concurring opinion.

October 9, 1969

Issued as Mandate: Nov. 3, 1969

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 23841

Hazel Palmer, et al.,
Appellants,

versus

Allen C. Thompson, Mayor,
City of Jackson, et al.,
Appellees.

OPINIONS OF THE COURT OF APPEALS

Appeal from the United States District Court for the Southern District of Mississippi

(October 9, 1969)

Before: Brown, Chief Judge; Rives, Tuttle, Wisdom, Gewin, Bell, Thornberry, Coleman, Goldberg, Ainsworth, Godbold, Dyer and Simpson, Circuit Judges.*

Rives, Circuit Judge: The briefs and arguments on rehearing en banc have been confined to the first point discussed in the original opinion; that is, to whether the City of Jackson denied the equal protection of the laws to Negroes by the closing of all of its public swimming pools. The findings of fact by the district court on this point were set forth in the original opinion, and, for convenience, are again quoted:

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* Judge Clayton, now deceased, participated in the decision of this case and expressed his written concurrence in the opinion and decision on February 5, 1968, prior to his last illness which disabled him from any further participation or action.

"The City of Jackson closed all swimming pools owned and operated by it in 1963, following the entry of a declaratory judgment by this Court in the case of *Clark v. Thompson,* 206 F. Supp. 539, affirmed 313 F.2d 637, cert. den. 376 U.S. 951, 84 S.Ct. 440, 11 L.Ed. 2d 312. No municipal swimming facilities have been opened to any citizen of either race since said time, and the City Council does not intend to reopen or operate any of these swimming facilities on an integrated basis. The personal safety of the citizens of the City and the maintenance of law and order would be endangered by the operation of public swimming pools on an integrated basis. These pools could not be economically operated in that manner. Although closed, the swimming facilities owned by the City are being properly maintained. In addition to closing the swimming facilities owned by it, the City cancelled its lease covering the Leavell Woods swimming pool in 1964."

On this rehearing we would observe the admonition of the Supreme Court that "generalizations do not decide concrete cases. 'Only by sifting facts and weighing circumstances' (*Burton v. Wilmington Parking Authority, supra* [365 U.S. 715], at 722) can we determine whether the reach of the Fourteenth Amendment extends to a particular case." *Evans v. Newton,* 1966, 382 U.S. 299, 300.[1] So doing, we search for further facts and circumstances.

First, it should be noted that the district court's findings were entered on the hearing of the plaintiffs' application for a temporary injunction. Thereafter the parties stipulated:

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[1] To like effect, see Reitman v. Mulkey, 1967, 387 U.S. 369, 378.

"* * * that this action be and the same is hereby submitted to the Court for final decision on the merits on the complaint, answer, and affidavits heretofore filed and submitted by the parties, and on the full and complete hearing heretofore afforded the parties, at which all parties had an opportunity to offer any and all evidence desired, and on this Court's letter opinion filed herein dated September 14, 1965, and on this Court's separate findings of fact and conclusions of law filed herein by this Court in connection with this Court's order overruling plaintiffs' application for a temporary injunction.

"It is further stipulated and agreed that a final judgment may be entered herein on the foregoing without further hearing and without the offering of any further or additional evidence herein."

The district court then, upon the same findings of fact, entered final judgment that the plaintiffs are not entitled to relief. We note particularly that all parties agreed that they have "had an opportunity to offer any and all evidence desired."

In the case of *Clark v. Thompson,* cited by the district court, a declaratory judgment had been entered, "That each of the three plaintiffs has a right to unsegregated use of the public recreational facilities of the City of Jackson." After that decision had been affirmed per curiam by this Court and certiorari denied by the Supreme Court, the zoo, parks, and all recreational facilities except the pools were opened to the use of whites and blacks alike. The pools were closed. The only evidence as to the reasons and motives for such closing is contained in affidavits of the Mayor and of the Director of the Department of Parks and Recreation. We quote from the Mayor's affidavit:

"Realizing that the personal safety of all of the citizens of the City and the maintenance of law and order would prohibit the operation of swimming pools on an integrated basis, and realizing that the said pools could not be operated economically on an integrated basis, the City made the decision subsequent to the Clark case to close all pools owned and operated by the City to members of both races. The City thereby decided not to offer that type of recreational facility to any of its citizens, and it has not done so and does not intend to reopen any of said pools.

"All other recreational facilities have been completely desegregated and have been made available to all citizens of the City regardless of race."

The Director's affidavit was to the same effect and was supplemented by a second affidavit stating the average annual operating expense and revenue of the pools for the years 1960, 1961 and 1962, from which it appears that there was an average annual loss of $11,700.00. The affidavit concluded: "that the City of Jackson would suffer a severe financial loss if it attempted to operate said pools, or any of them, on an integrated basis."

True, the City decided to close the pools rather than to operate them on an integrated basis. There was, however, no evidence that it reached that decision in an effort to impede further efforts to integrate. Nor did the court find any intent to chill or slow down the integration of other recreational facilities. To the contrary, as the Mayor's affidavit states, those were completely desegregated and made available to all citizens of the City regardless of race. The pools were closed because they could not be operated safely or economically on an integrated basis. Is that a denial of equal protection of the laws?

If so, then the plaintiffs must prevail, for "• • • law and order are not • • • to be preserved by depriving the Negro children of their constitutional rights."[2] Desirable as is economy in government and important as is the preservation of the public peace, "this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution."[3] For that principle to be applicable, however, it must be held that the result of closing the pools because they cannot be operated safely or economically on an integrated basis deprives Negroes of the equal protection of the law. In our opinion that simply is not true.

The operation of swimming pools is not an *essential* public function in the same sense as the conduct of elections,[4] the governing of a company town,[5] the operation or provision for the operation of a public utility,[6] or the operation and financing of public schools.[7]

Under the impetus of the declaratory judgment in *Clark v. Thompson, supra,* the City was making the transition in the operation of its recreational facilities from a segregated to an integrated basis. It had considerable dis-

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[2] Cooper v. Aaron, 1958, 358 U.S. 1, 16.

[3] Buchanan v. Warley, 1917, 245 U.S. 60, 81.

[4] Nixon v. Condon, 1932, 286 U.S. 73; Smith v. Allwright, 1944, 321 U.S. 649; Terry v. Adams, 1953, 345 U.S. 461.

[5] Marsh v. Alabama, 1946, 326 U.S. 501.

[6] Public Utilities Comm'n v. Pollak, 1952, 343 U.S. 451; Burton v. Wilmington Parking Authority, 1961, 365 U.S. 715, 724; Boman v. Birmingham Transit Co., 5 Cir. 1960, 280 F.2d 531; Baldwin v. Morgan, 5 Cir. 1961, 287 F.2d 750, 755.

[7] Brown v. Board of Education, 1954, 347 U.S. 483, 493; Guillory v. Tulane University, E.D. La. 1962, 203 F.Supp. 855, 859, 863; Hobson v. Hansen, D.D.C. 1967, 269 F.Supp. 401.

cretion as to how that transition could best be accomplished. Local authorities have the duty of easing the transition from an unconstitutional mode of operation to one that is constitutionally permissible. That has been held true as to the reapportionment of the state legislative bodies[8] and as to the desegregation of the public schools.[9] The Constitution does, however, require that the end result be constitutionally permissible.

The equal protection clause is negative in form, but there is no denying that positive action is often required to provide "equal protection." That is frequently true as to essential public functions. Other functions permit more latitude of action. As to swimming pools, which a city may furnish or not at its discretion, it seems to us that a city meets the test of the equal protection clause when it decides not to offer that type of recreational facility to any of its citizens on the ground that to do so would result in an unsafe and uneconomical operation.

There is, of course, no constitutional right to have access to a public swimming pool. No one would question that proposition in circumstances having no racial overtones; as, for example, where all citizens of a municipality are of the same race, the closing of all municipal pools would embody no unconstitutional action or result.[10]

Attempts to analogize this case to *Reitman v. Mulkey*, 1967, 387 U.S. 369, and *Griffin v. School Board of Prince*

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[8] Reynolds v. Sims, 1964, 377 U.S. 533.

[9] Brown v. Board of Education, 1954, 347 U.S. 483; Shuttlesworth v. Birmingham Board of Education, N.D. Ala. 1958, 162 F.Supp. 372, 379, 381, *aff'd*, 358 U.S. 101.

[10] Arguments related to a due process or impairment of contract theory were foreclosed to plaintiffs by such cases as Hunter v. Pittsburgh, 1907, 207 U.S. 161, 177, 178. See in this regard, Gomillion v. Lightfoot, 1960, 364 U.S. 339, 342-43.

Edward County, 1964, 377 U.S. 218, offer little assistance. In *Reitman*, the Court held unconstitutional a recently adopted state constitutional amendment which declared that no agency of the state could interfere with the right of a property vendor or lessor to sell, rent or lease to anyone he chose. Considering the "purpose, scope, and operative effect" of the amendment, the Court stated that by, in effect, nullifying existing fair-housing laws, the state had adopted an affirmative policy of encouraging private discrimination. Significant state involvement in the private housing market, by prior regulation of fair-housing practices, supported the Court's conclusion. This case offers no circumstances involving the regulation of private activity, the abandonment of which can be transmuted into discriminatory state action. It is significant further that the subject facility here, public in nature, has ceased to exist, whereas the private facilities in *Reitman*, by their very identity and nature, of necessity continued to exist. The possibility that private pool owners in Jackson may operate segregated pools henceforth does not indicate any such state involvement in the past, present or future as could possibly require the application of the *Reitman* principles here.

In *Griffin*, the Court held as a violation of the equal protection clause the closing of all of the public schools of Prince Edward County, Virginia. The Court predicated its decision on two factors. Noting that none of the other counties in Virginia had closed their schools,[11] the Court

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[11] On this point, Mr. Justice Black observed that "the Equal Protection Clause relates to equal protection of the laws 'between persons as such rather than between areas'," 377 U.S. at 230, but that Virginia law treated "the school children of Prince Edward County differently from the way it treats the school children of all other Virginia counties." Id.

pointed out that the state and county were supporting private, segregated schools with public funds, to the effect that, excluding one temporary expedient, "Prince Edward County school children, if they go to school in their own county, must go to racially segregated schools which, although designated as private, are beneficiaries of county and state support." 377 U.S. at 230-31. Pretermitting the question of swimming facilities available in other parts of Mississippi, on which there is no evidence, we see no involvement here of public funds applied to maintain any private swimming facilities.

The plaintiffs rely also on *Evans v. Newton*, 1966, 382 U.S. 296, but we do not think that case analogous. There the Court found that the public character of a purportedly private park required the park to be treated "as a public institution subject to the command of the Fourteenth Amendment," 382 U.S. at 302. "We only hold that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector." 382 U.S. at 301. In the case at bar, of course, there may well be inferred a "tradition of municipal control," but there the analogy must end. The city swimming pools in Jackson completely ceased to operate, whereas the park in *Evans v. Newton* continued to operate, with the benefit of continued "municipal maintenance and concern." 382 U.S. at 301.

Appellants have urged a theory other than those suggested explicitly by *Reitman, Griffin* and *Evans*. We understood them to argue in terms of a protected right to be a free and equal citizen. We understood counsel in oral argument, as well as by written brief, to state that the issue here is whether the Constitution forbids the City of Jackson from withdrawing a badge of equality. The

badge of equality, presumably, was the ability to swim in an integrated municipal swimming pool—the ability to enjoy, in an integrated fashion, recreational facilities operated by a municipality for its citizens. It cannot be disputed that were the badge of equality, here the ability to swim in an unsegregated pool, to be replaced by a badge implying inequality—segregated pools, the municipality's action could not be allowed. However, where the facilities around which revolve the status of equality are removed from the use and enjoyment of the entire community, we see no withdrawal of any badge of equality.

Plaintiffs extend their argument, however, urging that white people in general are more affluent and thus have greater access to private swimming facilities.[12] Therein, it is said, lies a fatal aspect of the alleged removal of the badge of equality—plaintiffs, and the class they represent, will continue to suffer unequal treatment as a result of municipal action. In this context, the argument carries little legal significance. The equal protection clause does not promise or guarantee economic or financial equality. In applying the requirements of the equal protection clause, this Court cannot require a city to operate a public swimming pool solely because the city's ceasing to do so forecloses the enjoyment by financially less fortunate citizens of recreational facilities available on a completely private basis to the more affluent.

Motive behind a municipal or a legislative action may be examined where the action potentially interferes with

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[12] One pool formerly leased by the City has subsequently been operated by the local Y.M.C.A. on a white-only basis. There is no evidence however, of any public involvement in the operation of that pool. See, *e.g.*, Evans v. Newton, 1966, 382 U.S. 299, 302, citing Terry v. Adams, 1953, 345 U.S. 461; Public Utilities Comm'n v. Pollak, 1952, 343 U.S. 451; Marsh v. Alabama, 1946, 326 U.S. 501.

or embodies a denial of constitutionally protected rights. See, *e.g.*, *Griffin v. School Board of Prince Edward County*, *supra*, and *Gomillion v. Lightfoot*, *supra*, n. 10. *Griffin*, *supra*, at 231, uses the expression that, "Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional." That expression must not be lifted out of context. Read in connection with the attached footnote, the preceding part of the paragraph, and the paragraph which follows, it is clear that the Court was speaking of the kind of abandonment of public schools which would operate to continue racial segregation. We do not read this statement to prohibit the City from taking race into consideration if not for an invidious or discriminatory purpose. The consideration of racial factors has been endorsed in cases of national defense,[13] the operation of the public schools,[14] and the selection of jurors.[15] In dismissing this complaint, after considering the affidavits and testimony, the district court found that the City officials acted in the interest of preventing violence and preserving economic soundness to the City's operations. Even though such motive obviously stemmed from racial considerations, we know of no prohibition to bar the City from taking such factors into account and being guided by conclusions resulting from their consideration.

Motivation has been pointed out here as a positive indication of municipal policy. It has been suggested that the

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[13] Hirabayashi v. United States, 1943, 320 U.S. 81, 100.

[14] Shuttlesworth v. Birmingham Board of Education, *supra*, n. 9; see also Darby v. Daniel, S.D.Miss. 1958, 168 F.Supp. 170, 186.

[15] Brooks v. Beto, 5 Cir. 1966, 366 F.2d 1, 25.

City has, in effect, adopted an official position that it would prefer to operate no pools rather than operate unsegregated pools. Without commenting on the soundness of the argument, we recognize that in the face of the substantial and legitimate objects which motivated the City's closing, to wit, the preservation of order and maintenance of economy in municipal activity, no such municipal policy can be inferred from the closing.

We agree with the district court that plaintiffs were not denied the equal protection of the laws by the closing of these swimming pools.

The judgment is Affirmed.

Chief Judge Brown, Judges Tuttle, Wisdom, Thornberry, Goldberg, and Simpson dissent reserving the right to file a dissenting opinion.

Judges Gewin, Coleman, Ainsworth, Godbold and Dyer, concur.

Judge Bell concurs in the result and specially reserving the right to file a concurring opinion.

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 23841

Hazel Palmer, et al.,
Appellants,
versus
Allen C. Thompson, Mayor,
City of Jackson, et al.,
Appellees.

CONCURRING OPINION

Appeal from the United States District Court for the Southern District of Mississippi

(January 7, 1970)

Bell, Circuit Judge, specially concurring, with whom Judges Rives, Gewin, Coleman, Ainsworth, Godbold and Dyer join.

The footnote at the beginning of the majority opinion shows that Judge Clayton, now deceased, had concurred on February 5, 1968. Now almost two years later, the dissenting opinion has been filed. The pools in question here were closed in 1963. The suit which forms the subject matter of this appeal was filed in 1965. There was a prompt hearing in the district court and the judgment appealed from was rendered in 1965. The original panel decision affirming the denial of relief by the district court was

rendered on August 29, 1967. *Palmer v. Thompson,* 5 Cir., 1967, 391 F.2d 324. This is not to attribute the long delay to the parties; it is court produced. In any event, one must wonder what has happened to the pools in the long interim! Are they still in existence? If so, what condition are they in?

The final footnote[1] of the dissenting opinion shows that the differences between the majority and the dissenters are largely factual. The majority opinion had emphasized that "The only evidence as to the reasons and motives for such closing is contained in affidavits of the Mayor and of the Director of the Department of Parks and Recreation." [Majority typed opinion, p. 3]. The majority opinion also noted particularly that "all parties agreed that they had 'had an opportunity to offer any and all evidence desired.'" [p. 3] With deference, it would appear that the dissenting opinion, in making the finding that the City of Jackson acted in bad faith, simply departs from the record.[2] There is no record basis for such a finding.

Whether to operate swimming pools, racial discrimination aside, is a matter for the City of Jackson. We can easily surmise, indeed it may not be disputed, that the closings here were racially motivated. Mere racial motivation, however, is not proof of a racially discriminatory purpose in the closing. The presence or absence of such a

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[1] "We do not say that a city may never abandon a previously rendered municipal service. If the facts show that the city has acted in good faith for economic or other nonracial reasons, the action would have no overtones of racial degradation, and would therefore not offend the Constitution."

[2] Judge Rives wishes it noted that the City of Montgomery parks, contrary to footnote 14 of the majority opinion, are open and have been since 1965. This fact was called to the attention of the court by Judge Rives prior to the filing of the dissenting opinion.

purpose was and is the real issue. Courts, including federal courts, must travel on proof and there was a failure of proof in this case on the part of plaintiffs. We cannot assume racial discrimination simply from the fact of the closings. Constitutional principles, as important as they are, must nevertheless rest on facts. It may be that on a full hearing a factual base could be developed for the constitutional principles announced by the dissenting opinion. The case is here, however, on affidavits and the necessary factual basis is absent. I, therefore, concur.

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 23841

Hazel Palmer, et al.,
Appellants,
versus
Allen C. Thompson, Mayor,
City of Jackson, et al.,
Appellees.

DISSENTING OPINION

Appeal from the United States District Court for the Southern District of Mississippi

(November 25, 1969)

Wisdom, dissenting, joined by Brown, Chief Judge, Tuttle, Thornberry, Goldberg and Simpson.

Wisdom, I respectfully dissent:

Long exposure to obvious and non-obvious racial discrimination has seasoned this Court. It is astonishing, therefore, to find that half of the member of this Court accept at face value the two excuses the City of Jackson offered for closing its swimming pools and wading pools. As found by the district court and blessed in the affirming opinion, these excuses are:

> "[1] The personal safety of the citizens of the City and the maintenance of law and order would be

endangered by the operation of public swimming pools on an integrated basis.

[2] These pools could not be economically operated in that manner."

In *Griffin v. County School Board of Prince Edward County*, 1964, 377 U.S. 218, 84 S. Ct. 1226, 12 L.Ed. 2d 256, the School Board in Prince Edward County, Virginia, motivated by the intention of circumventing a desegragation order, as the City of Jackson was here motivated, closed the public schools in the county. The Supreme Court ordered the schools reopened. Moreover, the Court instructed the district court that it could require the County Supervisors to take the affirmative action of levying taxes to raise funds adequate to reopen and maintain the public school system. There are manifest factual differences between *Griffin* and the case before this Court: public schools in other Virginia counties stayed open; here, all municipal pools in Jackson were closed, although all other municipal recreational facilities were available on a desegregated basis. And there is a difference in the degree of essentiality between public school education and public recreational facilities—although no one today can deny that a city owes an obligation to its citizens to provide reasonably adequate recreational facilities.[1] But the rationale on which *Griffin* rests applies here:

> Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional. 377 U.S. at 231.

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[1] *See* Evans v. Newton, 966, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 45.

I

A. Over fifty years ago, the Supreme Court demolished an excuse similar to the first excuse the City advances here. In *Buchanan v. Warley,* 1917, 245 U.S. 60, 38 S.Ct. 16, 62 L. Ed. 149, the Court invalidated an ordinance of the City of Louisville prohibiting Negroes from occupying houses in blocks where the greater number of houses were occupied by whites, and vice versa. The City urged that the ordinance "will promote the public peace by preventing race conflicts". The Court dismissed this argument with a single sentence: "Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." Over fifteen years ago, in the second *Brown*[2] decision, the Supreme Court declared: "[It] should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." 349 U.S. at 300. Over ten years ago, the Court dealt with a similar argument in the Little Rock school case, *Cooper v. Aaron,* 1958, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5. After quoting *Buchanan v. Warley,* the Court said: "Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights." In *Watson v. City of Memphis,* 1963, 373 U.S. 526, 83 S.Ct. 1314, 10 L.Ed. 2d 529, the City of Memphis sought to defend a gradual planned transition from segregated to integrated park facilities by asserting that it was necessary "to prevent interracial disturbances, violence, riots, and community confusion and turmoil," 373 U.S. at 535. For a unanimous Court, Mr. Jusice Goldberg met this contention by asserting that the "compelling answer . . .

[2] 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083.

is that constitutional rights may not be denied simply because of hostility to their assertion or exercise." Id.

In *Cooper v. Aaron* the district court found that there was "extreme public hostility" and that there were numerous acts of violence and disorder caused by opposition to desegregation of the schools in Little Rock. Here, there is no past history, only speculation rebutted by the existence of desegregated pools in southern cities.[3] The City of Jackson's operation of other public recreational facilities on a desegregated basis indicates that the city's law enforcement officers are able to preserve peace and that the pools were closed not to promote peace but to prevent blacks and whites swimming in the same water.

B. The second reason the City asserts for closing the pools is that "these pools could not be economically operated" on an integrated basis. At about the same time the City closed its pools, it did away with public rest rooms in the Municipal Court Building and removed the benches and tables from the Livingston Park Zoo. We are told in Mayor Thompson's affidavit, "The public rest rooms are not maintained in the Municipal Court Building for the reason that the efficient operation of said building does not permit the furnishing of these facilities for the general public". Perhaps we are also supposed to believe that benches in Livingston Park were also removed for reasons of economy and efficiency.

A study of the record shows that Jackson, like all cities, does not expect its swimming pools, wading pools, and park benches to be maintained profitably as if each recreational facility were a business independent of the

[3] As the Court knows, in some cities such as Tallahassee and New Orleans, pools that had been closed have now been reopened.

facilities and activities a municipal park offers its citizens.

The Department of Parks and Recreation operates all of the parks and playgrounds in the City of Jackson. The parks have such facilities as swimming pools, wading pools, "kiddie rides", baseball diamonds, tennis courts, and similar attractions. The Department also operates the Municipal Auditorium, College Park (Negro) Auditorium, Community Centers, Municipal golf courses (including a nine hole *Negro* golf course), Livingston Lake, city concessions, and the City Zoo. As is evident from the affidavit of George Kurts, Director of the Department, and from his itemized list of the numerous activities and facilities the Department maintains, few, if any, of the recreational activities could have been self-supporting.

For several years the pools for whites in Livingston, Battlefield Park, and College Park and the pool for Negroes in College Park had expenses of $10,000 each against revenues of $8000 each for the white pools and $2500 for the Negro pool. In short, the pools had never been operated economically on a segregated basis; nor were the wading pools or park benches. The City charged swimming fees of only ten cents and twenty cents, described by the Director as the "lowest to be found in the country . . . in order to serve as many people as possible."

The swimming pools and wading pools, like benches in Livingston Park, are parts of a large recreation package. In Jackson the operating funds for the Department of Parks and Recreation come from a one mill levy and from revenue derived from certain operations such as auditorium receipts, pool and lake admissions, golf fees, concessions, kiddie rides, vending machines, and special events. And, as the Director said, "From the General Fund

is appropriated supplementary money needed to meet the overall operation of Parks and Recreation."

The district court found that the "City of Jackson closed all swimming pools owned and operated by it in 1963, following the entry of a declaratory judgment [of that] court in the case of *Clark v. Thompson*, 206 F. Supp. 539 requiring integration of the City's swimming and wading pools". This Court affirmed that decision, 313 F. 2d 637, and in April 1963 denied a rehearing. May 27, 1963, a committee, representing the Negro community in Jackson, met with Mayor Thompson and other city officials to present their grievances, including a request that the City desegregate its public facilities including parks and swimming pools. According to the uncontradicted affidavit of one of the Negroes present, Mayor Thompson declared that the public policy of the City of Jackson was to continue segregation of the races in the use and operation of city facilities. May 30, 1963, the Jackson Daily News reported Mayor Thompson as having announced, "Public swimming pools would not be opened on schedule this year due to some minor water difficulty". "Minor water difficulty" has disappeared as an excuse for the City's not having opened its pools in 1963 or since. The pools are still closed, except for the pool at Leavell Woods Park. They are being properly maintained, —without any off-setting revenues—or were in August 1965, according to Director Kurts.

The Leavell Woods Pool, unlike the other pools, had been leased by the City. Early in 1964 the City cancelled its lease on this pool. The Young Men's Christian Association promptly took over the leasehold and has since operated the pool exclusively for white patrons.

C. The excuse that integrated pools would pose a threat to law and order may have resulted from an honest

fear held by the Jackson City Fathers. But this fear does not justify yielding to the community hostility that produces it. Yielding puts a premium on violence, disorder, and further community resistance.

The excuse that the City of Jackson closed its swimming and wading pools because they could not be operated profitably is frivolous.

The City's action in closing its pools must stand or fall on a city's right to close a recreational facility on the "grounds of race and opposition to desegregation".

II.

A. My affirming brothers could not have been entirely satisfied with the reasons the City put forth for closing the swimming pools and wading ponds. They rely heavily, as did the district court, on the argument that the act operated equally on Negroes and whites. They say:

> "It cannot be disputed that were the badge of equality, here the ability to swim in an unsegregated pool, to be replaced by a badge implying inequality—segregated pools, the municipality's action could not be allowed. However, where the facilities around which revolve the status of equality are removed from the use and enjoyment of the entire community, we see no withdrawal of any badge of equality."

This is a tired contention, one that has been overworked in civil rights cases. In *Griffin* the public school facilities of Prince Edward County were "removed from the use and enjoyment of the entire community". There too the public officials argued that tuition grants, as well as closing the schools, applied equally to Negroes and whites. Nevertheless the Supreme Court held that this retreat from the

operation of a public facility could not be justified on grounds of race and opposition to desegregation.

In *Loving v. Virginia,* 1967, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010, the State argued that its miscegenation statutes punish equally both the Negro and white participants in an interracial marriage. The Supreme Court "reject[ed] the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classification from the Fourteenth Amendment's proscription of all invidious racial discrimination". In *Anderson v. Martin,* 1963, 375 U.S. 399, 84 S.Ct. 454, 11 L.Ed.2d 430, the State defended a statute requiring that in all elections the nomination papers and ballots should designate the race of candidates. The State argued that the Act was "nondiscriminatory because the labeling provision applied equally to Negro and white". The Court held that in fact the State was attempting to encourage its citizens to vote for a candidate solely on the ground of race. "Race is the factor upon which the statute operates and its involvement promotes the ultimate discrimination which is sufficient to make it invalid." In *Virginia State Board of Education v. Hamm,* E.D.Va. 1964, 230 F. Supp. 156, *aff'd* 379 U.S. 19 (1964), the Virginia law under attack required that lists of voters and property tax assessments be kept separately for each race. The Negroes attacking the statutes demonstrated no measurable inequality or discriminatory effect. Nonetheless the Court summarily affirmed the district court's holding the law unconstitutional.

In cases such as *Loving v. Virginia, Anderson v. Martin,* and *Hamm,* the statute may have applied equally to Negroes and whites but that fact was irrelevant because race was the factor upon which the statute operated, just as race

was the factor that led the City of Jackson to close its pools.

Measurable inequality was not the basis for the Supreme Court's per curiam decisions that applied *Brown* to public parks[4] and beaches,[5] municipal theatres[6] and golf courses,[7] busses[8] and courtrooms.[9] In these cases the central vice in the unlawful state action was the forced display of a racial badge of inferiority. As the first Justice Harlan put it: "[Segregation statutes] in fact proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens . . ."[10] Just as certainly as did the Jim Crow law considered in *Plessy v. Ferguson*, the swimming pool closing proceeds on the ground that Negroes are "so inferior and degraded that they cannot be allowed" to use public swimming pools with white people.

In this case, however, and in *Griffin* the equal application argument rests on the fallacious assumption that closing a public facility has the same effect on both Negroes and whites. Closing the schools in Prince Edward County had

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[4] New Orleans City Park Development Ass'n v. Detiege, 1958, 358 U.S. 54, 79 S.Ct. 99, 3 L.Ed.2d 46.

[5] Dawson v. Mayor and City Council of Baltimore City, 1955, 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 774.

[6] Muir v. Louisville Park Theatrical Ass'n, 1954, 347 U.S. 971, 74 S.Ct. 783, 98 L.Ed. 1112; Schiro v. Bynum, 964, 375 U.S. 395, 84 S.Ct. 452, 11 L.Ed.2d 412.

[7] Holmes v. City of Atlanta, 1955, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 776.

[8] Gayle v. Browder, 1956, 352 U.S. 903, 77 S.Ct. 144, 1 L.Ed.2d 114.

[9] Johnson v. Virginia, 1963, 373 U.S. 61, 83 S.Ct. 1053, 10 L.Ed.2d 195.

[10] Plessy v. Ferguson, 1896, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256.

a conspicuously greater effect on Negro children than on white children. As Justice Black said:

> "Closing Prince Edward's schools bears more heavily on Negro children in Prince Edward County since white children there have accredited private schools which they can attend, while colored children until very recently have had no available private schools, and even the school they now attend is a temporary expedient." (377 U.S. at 230).

Here too closing the pools in Jackson "bears more heavily on Negro children". Many white children in Jackson have the opportunity of swimming in country club pools or in pools owned by private persons or in pools operated at summer camps; all may swim in the Leavell Woods Pool. Few, if any, Negroes in Jackson have access to a swimming pool.

In *Hall v. St. Helena Parish School Board*, E.D.La. 1961, 197 F. Supp. 649, 655, *aff'd* 368 U.S. 515 (1962), the court said:

> "to speak of this law [closing the schools and providing tuition grants for students attending private schools] as operating equally is to equate equal protection with the equality Anatole France spoke of: The law, 'in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.' "[11]

B. The affirming opinion dismisses the subject of the Leavell Woods Community Park pool with the brief statement in a footnote that "There is no evidence, however,

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[11] Anatole France, Le Lys Rouge, Ch. VII (1894).

of any public involvement in the operation of that pool". After the city cancelled its lease of the pool the Negroes in Jackson suffered the humiliation of seeing the Young Men's Christian Association operate the pool for whites only. This is exactly the kind of badge of inferiority my brothers refer to as impermissible. The City's withdrawal from performing a recreational function in favor of a private, segregated operation of the same facility is similar to the state's involvement in private discrimination condemned in *Burton v. Wilmington Parking Authority*, 1961, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45. In *Burton* the Supreme Court found that the State of Delaware had elected to place its power and prestige behind the admitted discrimination against Negroes by a private restaurant in a state-owned building.

III

We turn now to the decisions which support the plaintiff's position.

"[A]cts generally lawful may become unlawful when done to accomplish an illegal end and a constitutional power can not be used by way of condition to attain an unconstitutional result." *Western Union Telegraph Co. v. Foster*, 1918, 247 U.S. 105, 38 S.Ct. 438, 62 L.Ed. 1006. When, as in this case, a city closes a public facility for the purpose of avoiding a desegregation order and when the necessary effect of the city's retreat or withdrawal is to discriminate against Negroes the otherwise lawful closure becomes unlawful.[12]

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[12] The city's argument fails to take account of the crucial distinction between the state's failure to institute a new service and its abandonment of a service if formerly provided. There are many things a

(*Continued on next page*)

In *Evans v. Newton*, 1966 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 275, the City of Macon, Georgia, was trustee for Bacon's Park, a park open only to white persons. The Court held that the City could not resign as trustee, abandoning the park as a public activity, to avoid integration. "A park . . . is more like a fire department or police department that traditionally serves the community." 382 U.S. at 302. *Evans* is not distinguishable from the instant case. Considering the parks as a whole or the public recreational activities as a package, the City of Jackson should no more be allowed to abandon one phase of public recreation to avoid desegregation than the City

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(Continued from preceding page)

state chooses not to do. When a state simply does not create one new program, or another, there is no change in the status quo. There is not "action" which could have a discriminatory impact. But when a state discontinues an existing service, clearly there is "action", and the action may well be a vehicle for discrimination. Practical as well as theoretical considerations dictate a distinction between the failure to establish a service and the abandonment of an existing one. Most important is the impact on the individual citizens. When a service has never existed there is no action to bring the state's animus home to those against whom it is directed. There is nothing to focus a generalized discriminatory atmosphere into a stinging rebuke. The impact is naturally much sharper when the state expresses its animus by taking away a previously enjoyed privilege. Then the state's discrimination is concentrated in an identifiable act. The rebuke is felt.

From the viewpoint of the city, also, it is more practical for a court to forbid the abandonment of a service than to order its original establishment. In the former case, facilities already exist, policies have been formulated, and the city already has an operative system of administration. In the latter case, the entire program must be constructed. Finally, it is more consonant with the traditional function of courts to enjoin abandonment than order a city to create and adopt an entirely new program.

In Gomillion v. Lightfoot, for example, the Court based its decision, at least in part, on the ground that the Alabama gerrymander deprived the Negro plaintiffs of something they had previously enjoyed—their "pre-existing municipal vote". 364 U.S. at 341.

of Macon was allowed to turn over Bacon's Park to private trustees. As the Court noted, "Mass recreation through the use of private parks is plainly in the public domain."[13] 382 U.S. at 302. Bacon's Park in Macon would have ceased to exist too, as far as the City was concerned and as far as Negroes could use it, but for the Court's decision refusing to allow the City to retreat from its responsibility.

The Girard College case is another example of the principle that a city cannot by retreating avoid desegregating a facility. In *Commonwealth of Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia*, 1957, 353 U.S. 230, 77 S.Ct. 806, 1 L.Ed.2d 792, the Supreme Court held that Girard College, regardless of the language of the trust limiting students to white students, should be desegregated. The Orphans' Court of Pennsylvania, removed the City of Philadelphia as trustee and installed private persons as trustees. The Court of Appeals held that the State could not withdraw; the appointment of private trustees to continue operation of the college was unconstitutional state action. *Commonwealth of Pennsylvania v. Brown*, 3 Cir. 1968, 392 F.2d 120.

Thus in both these cases, as in the instant case, the city government tried to escape desegragating a facility by terminating the city's connection with the facility. The only difference here is that the method used to accomplish the objective was closing the pools rather than withdrawing as trustee. But it is just as wrong to close public facilities for racial reasons as it is to operate them on a racial basis. In each case race is the dominant factor guiding the decision.

In *Reitman v. Mulkey*, 1967, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 230, the Supreme Court affirmed a California de-

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[13] Citing Watson v. Memphis, 373 U.S. 526.

cision holding unconstitutional an amendment to the California Constitution, approved by the voters, repealing existing open housing laws and forbidding the State's interfering in the future with the absolute right of any person to sell or lease his property to any person. The amendment was neutral on its face and could be said to operate equally on Negroes and whites. The Court held that the amendment was discriminatory; that "even where the State can be charged only with encouraging rather than commanding discrimination", there was prohibited state involvement.

To find state discrimination the Court used the "three factor test" which the California Supreme Court enunciated: (1) "The historical context and the conditions existing prior to its enactment", (2) its "immediate objective", that is, its "immediate design and intent", and (3) its "ultimate effect". Applying the first factor, this Court is so familiar with the historical context and the conditions existing in Mississippi at the time the Jackson pools were closed that it is necessary only to quote from a case we decided in May 1963: "We again take judicial notice that the State of Mississippi has a steel-hard, inflexible, undeviating, official policy of segregation." *United States v. City of Jackson,* 5 Cir. 1963, 318 F.2d 1. Second, the immediate objective in closing the public pools was to avoid complying with the desegregation order issued in *Clark v. Thompson.* Third, for white persons the first effect of closing the pools was to encourage private enterprise to supply segregated pools for white patrons. For Negroes the first effect was punitive: they were denied the opportunity of using even their segregated pool. The ultimate effect is to encourage segregation to the detriment of Negroes. All public recreational facilities are now in jeopardy.

In *Hunter v. Erickson,* 1969, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616, the City of Akron, Ohio, amended its charter to prevent the city council enacting any ordinance dealing with racial, religious, or ancestral discrimination in housing without the approval of a majority of voters. The Court found that this was a denial of equal protection in that "Only laws to end housing discrimination based on 'race, color, religion, national origin or ancestry' must run § 137's gauntlet." There again the City argued that all groups were treated equally. The Court said, "Moreover, although the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority." Thus, as in *Reitman* the court regarded the actual impact on minority groups as controlling rather than the apparent neutrality of the law.

Federal courts are used to comparable situations in the field of labor law. Time and again this Court has had to determine whether an employee was discharged for good reason, for no reason, or on account of the employee's labor union activity. In *Textile Workers of America v. Darlington Manufacturing Company,* 1965, 380 U.S. 263, 85 S.Ct. 994, 13 L.Ed.2d 827, the defendants owned several plants, in one of which employees sought to organize for collective bargaining. The defendants closed the plant in question shortly after the employees voted in favor of unionization. The Supreme Court remanded the case to the NLRB for a factual determination of the purpose and effect of closing the plant. The company could go out of business entirely, but closing one plant was an unfair labor practice, if motivated by a purpose to chill unionism in any of the remaining plants. Here there can be no doubt of the chilling effect the closing of Jackson's pools had on the Negroes who presented their grievances to Mayor Thomp-

son and on all Negroes using the parks and other public facilities. Negroes in Jackson are now on notice that a petition to redress grievances may lead to a change for the worse.

Gomillion v. Lightfoot, 1960, 364 U.S. 339, 81 S.St. 125, 5 L.Ed.2d 110, involved another situation where the factual effect of racially motivated action was determinative of unconstitutionality. The Alabama legislature had redrawn the boundaries of the City of Tuskegee to exclude most of the Negro voters. The legislature has broad authority to fix and from time to time alter municipal borders. But state authority is not insulated from judicial control "when state power is used as an instrument for circumventing a federally protected right". 364 U.S. at 347. In many cases, said Justice Frankfurter, the Court has "prohibited a State from exploiting a power acknowledged to be absolute in an isolated context". The Court held that the Fifteenth Amendment negated the state's power to redraw boundaries that did away with the Negroes' pre-existing right to vote in municipal elections.

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The closing of the City's pools has done more than deprive a few thousand Negroes of the pleasures of swimming. It has taught Jackson's Negroes a lesson: In Jackson the price of protest is high. Negroes there now know that they risk losing even segregated public facilities if they dare to protest segregation. Negroes will now think twice before protesting segregated public parks, segregated public libraries, or other segregated facilities. They must first decide whether they wish to risk living without the facility altogether, and at the same time engendering further animosity from a white community which has lost its public facilities also through the Negroes' attempts to desegregate these facilities.

The long-range effects are manifold and far-reaching. If the City's pools may be eliminated from the public domain, parks,[14] athletic activities, and libraries also may be closed. No one can say how many other cities may also close their pools or other public facilities. The City's action tends to separate the races, encourage private discrimination, and raise substantial obstacles for Negroes asserting the rights of national citizenship created by the Wartime Amendments.

We should not be misled by the equal-application argument. That argument smacks of the repudiated separate-but-equal doctrine of *Plessy v. Ferguson*. We should not be misled by focusing on the city's non-operation of the pools. Closing the pools as an official act to prevent Negroes from enjoying equal status with whites constituted the unlawful state action. It had the same purpose and many of the same effects as maintaining separate pools.

We should recognize the actual traumatic impact of the action on Negroes for what it was. It was a reaffirmation of the *Dred Scott* article of faith that Negroes are indeed "a subordinate or inferior class of beings, who had been subjugated by the dominant race" and are not members of the "people of the United States".[15] This is the badge of servitude, the sign of second-class citizenship, the stigma that the Thirteenth, Fourteenth, and Fifteenth Amendments were designed to eradicate.[16]

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[14] The City of Montgomery closed its parks January 1, 1959. They are still closed. A panel of this Court held that it was "a matter committed to the wisdom of the members of the Board of Commissioners and is not subject to review by the Court in the absence of some violation of the Constitution of the United States." City of Montgomery v. Gilmore, 5 Cir. 1960, 277 F.2d 364.

[15] Dred Scott v. Sanford, 1857, 60 U.S. (19 How.) 393.

[16] We do not say that a city may never abandon a previously rendered municipal service. If the facts show that the city has acted in good faith for economic or other nonracial reasons, the action would have no overtones of racial degradation, and would therefore not offend the Constitution.

In The
UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 23841

Hazel Palmer, et al.,
Appellants,
versus
Allen C. Thompson, Mayor, City of Jackson, et al.,
Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

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(January 22, 1970)

ADDENDUM TO THE DISSENTING OPINION

Wisdom, Circuit Judge: I erred in saying that the public parks in Montgomery, which the City closed in 1959, are still closed. See footnote 2 of Judge Bell's opinion. As a matter of fact, since 1965 anyone may enjoy the trees, the flowers, the scenic beauty of the parks. But visitors to Montgomery's park will find no animals in the City Zoo and no water in the public swimming pools.

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 19

Hazel Palmer, et al.,
Petitioners,
vs.
Allen C. Thompson, Mayor, City of Jackson, et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 8, 1970.

/s/ Warren E. Burger
Chief Justice of the United States

Dated this 23 day of December, 1969.

APPENDIX B

United States of America

UNITED STATES DISTRICT COURT
for the Southern District of Mississippi

Hazel Palmer, et al.,

vs.

Allen C. Thompson, Mayor, City of Jackson Mississippi, et al.

(Civil Action No. 3790)

AFFIDAVIT OF CAROLYN STEVENS

County of Hinds,
State of Mississippi—ss.

Personally came and appeared before me, the undersigned authority, in and for the County and State of aforesaid Carolyn Stevens, who after being duly sworn by me states upon her oath that:

1. That she is one of the plaintiffs in the above entitled cause.

2. That she is 26 years old and a citizen of the United States and a member of the Negro race and has been a resident of the City of Jackson, County of Hinds, for her entire life.

3. That she is the mother of two minor children ages four and two, who reside with her in the City of Jackson, County of Hinds, Mississippi. Said children are healthy, active and in need of adequate recreational facilities in order to enjoy the benefits of a normal and healthy childhood.

4. That she is part owner of a certain parcel of real property located within the corporate limits of the City of Jackson upon which various real property taxes have been levied from time to time by public officials and used to defray the expenses of erecting and maintaining certain public facilities including parks in the City of Jackson, Mississippi.

5. That from December 1, 1945 and up until 1963 the City of Jackson, Mississippi by and through the Jackson Department of Parks and Recreation have owned, operated and maintained various public parks within the City of Jackson and at public expenses. These various parks include facilities for various public recreational activities including but without limitation golf, tennis, playgrounds and in particular swimming and wading facilities.

6. That these facilities and parks as of approximately 1960 included at least seven different park facilities and approximately 700 acres of park grounds within the corporate limits of the City of Jackson. Among the parks were the following: Livinston, Battlefield, Riverside, Leavell Woods, Community Park, College Park and the Air Base Recreational facility, all of which except the last named includes wading pool or swimming pool.

7. A full description of each recreational facility referred to in the proceeding paragraph appears in an official publication of the Jackson Department of Public Recreation of the City of Jackson. A copy of which is annexed hereto and marked affiant's Exhibit "A".

8. In 1962, the population of the City of Jackson was 150,000, 100,000 of whom were members of the white race and 50,000 of whom were members of the Negro race. Between the years 1954 and 1963 and continuing up until the present time it was the stated and strict policy of the

State of Mississippi and the City of Jackson and the respective officials and representatives to maintain and enforce segregation of the races with regard to creation, operation and use of public facilities including those public parks and swimming facilities hereinbefore referred to and described in Affiant's Exhibit "A".

9. As a part of the policy of racial segregation maintained and enforced by the City of Jackson with regard to swimming facilities, the Department of Parks and Recreation did prior to 1963 maintain separate parks and swimming pool, golf and auditorium facilities for Negroes which separate Negro facilities are identified and described by the City itself in Affiant's Exhibit "A".

10. During the year 1963, and particularly in May and June of that year, Negro citizens of Jackson organized together for the purpose of presenting certain grievances of the Jackson Negro Community to the public authorities generally and to defendant Thompson as Mayor of Jackson in particular. A committee representing the Negro community met with defendant Thompson and City Commissioners D. L. Luckey and Tom Marshall on May 27, 1963 to present said grievances to Mayor Thompson and other City Officials. These grievances included a specific demand that the City of Jackson desegregate public facilities including public parks and swimming facilities.

11. Thereafter, and on various occasions, defendant Thompson stated and declared that the public policy of the City of Jackson was to continue segregation of the races with regard to use and operation of City facilities. Affiant has made a study of the newspaper accounts of defendant Thompson's statements regarding segregation of public facilities during the critical months of May and June of 1963. Defendant Thompson's statements are cata-

logued in Affiant's Exhibit "B", and display on unequivocal intention on the part of the chief executive of the City of Jackson to prevent integration of the races at public facilities of the City of Jackson at whatever cost (See Affiant's Exhibit "B").

12. Thereafter and on or about May 30, 1963, defendant Thompson was reported as having announced, "Public swimming pools would not be opened on schedule this year due to some minor water difficulty." (*Jackson Daily News*, May 30, 1963, p. 1).

13. From May 30, 1963, until the present time swimming and wading pools at all public parks in the City of Jackson has been closed down and inoperative with the exception of the swimming pool at Leavell Woods Park. Since May 30, 1963, white and Negro citizens of the City of Jackson have been deprived of the right to use and enjoy public bathing facilities at all City parks except at the Leavell Woods Park.

14. Affiant states that upon information and belief the Leavell Woods swimming pool has been transferred, leased, or granted to private persons, in particular the Leavell Woods Community Foundation, a non-profit Mississippi Corporation, and/or the Young Men's Christian Association of Jackson, Mississippi . . . which organizations are presently operating said pool in such a way as to prevent Negro citizens including the plaintiffs herein from entering and enjoying the same. Affiant is informed and believes that defendants, acting under color of authority of the law of the State of Mississippi and City of Jackson have closed the swimming and park facilities of the City of Jackson for the sole purpose of preventing Negro citizens of the City of Jackson from enjoying the use and benefit of such facilities.

15. Affiant is further informed and believes that defendants have into contractual arrangements with the

Young Men's Christian Association of Jackson, Mississippi and/or the Leavell Woods Community Foundation of Jackson, Mississippi. These arrangements were intended to and do have the result of permitting private organizations to operate the swimming pool at Leavell Woods Park in a racially discriminatory manner thus excluding affiant, plaintiffs and other similarly situated from the use and enjoyment of the same. Defendants acts and conduct as alleged in the preceeding paragraphs injure affiant, plaintiffs and others similarly situated as follows:

1) Public pools at Battlefield Park, College Park, Riverside Park, and Livingston Park are being permitted to fall into a state of decline and decay through non-use and improper maintenance.

2) Affiant, plaintiffs and others similarly situated in Jackson, Mississippi, are being denied access to public swimming pools at Leavell Woods Park despite the fact that said pool is being used and enjoyed by white citizens of Jackson.

3) Negro citizens of Jackson and particularly Negro children are required to seek bathing, facilities in dangerous circumstances. As the result of this situation, two Negro children, Robert Kelly 14 and Melvin Houseworth, 11 were recently drowned while swimming in the Pearl River because public bathing facilities and appropriate supervision was not available to them.

And further Affiant saith not.

.....
Affiant

Sworn to and Subscribed before me a Notary

..... County, Mississippi
My Commission expires.....

AFFIANT'S EXHIBIT "B"

I. *Jackson Daily News*

May 24, 1962, p.1, (quoting Mayor Thompson):

"We will do all right this year at the swimming pools", the Mayor noted, 'but if these agitators keep up their pressure, we would have five colored swimming pools because we are not going to have any intermingling." . . . He said the City now has legislative authority to sell the pools or close them down if they can't be sold.

II. *Jackson Daily News*

May 28, 1963 (quoting Mayor Thomson):

"In spite of the current agitation, the Commissioners and I shall continue to plan and seek money for additional parks for our Negro citizens. Tomorrow we are discussing with local Negro citizens plans to immediately begin a new clubhouse and library in the Grove Park area, and other park and recreational facilities for Negroes throughout the City. We cannot proceed, however, on the proposed $100,000 expenditure for a Negro swimming pool in the Grove Park area as long as there is the threat of racial disturbances."

III. *Jackson Daily News*

May 24, 1963,, p. 1

"Governor Ross Barnett today commended Mayor Thompson for his pledge to maintain Jackson's present separation of the races."

IV. *Jackson Daily News*

May 25, 1963, p. 1

"Thompson said neither agitators nor President Kennedy will change the determination of Jackson to retain segregation."

In The
UNITED STATES DISTRICT COURT
for the Southern District of Missisippi
Jackson Division

Civil Action No. 3790

Hazel Palmer, et al.,
Plaintiffs,
vs.
Allen C. Thompson, et al.,
Defendants.

AFFIDAVIT OF GEORGE T. KURTS

United States of America
State of Mississippi
County of Hinds

Personally appeared before me, the undersigned authority in and for the jurisdiction aforesaid, George T. Kurts, who having been by me first duly sworn deposes and states on oath as follows, to-wit:

That he is Director of the Department of Parks & Recreation of the City of Jackson, and that he is Manager of the two city auditoriums and has occupied said positions since December 1, 1945.

Affiant denies that the public pool at either Battlefield Park or College Park or Riverside Park or Livingston Park is being permitted to fall into a state of decline and decay through nonuse or improper maintenance, and

would show unto the Court that each of said pools is being properly maintained.

Affiant would further show that for the years 1960, 1961, and 1962 the average operating expense of the pools in Battlefield Park, College Park, and Riverside Park was approximately $10,000.00 each; that the average revenue from the operation of the pools at Battlefield Park and Riverside Park for said years was approximately $8,000.00 each; that the average revenue from College Park for said years was approximately $2300.00; that the City of Jackson would suffer a serious financial loss if it attempted to operate said pools, or any of them, on an integrated basis.

George T. Kurts

Sworn to and Subscribed before me, this ... day of August, 1965.

.....
Notary Public
My commission expires .....

CERTIFICATE

The undersigned counsel of record for the defendants in the above styled and numbered action hereby certifies that a true copy of the foregoing affidavit has been this day forwarded by United States Mail, postage prepaid, to Hon. Leonard W. Rosenthal, 313 E. Capitol, Jackson, Mississippi, Attorney of Record for the plaintiffs.

This ... day of August, 1965.

.....
Of Counsel for Defendants

In The
UNITED STATES DISTRICT COURT
for the Southern District of Mississippi
Jackson Division

Civil Action No. 3790

Hazel Palmer, et al.,
Plaintiffs,
vs.
Allen C. Thompson, Mayor, City of Jackson, et al.
Defendants.

AFFIDAVIT OF ALLEN C. THOMPSON

United States of America
State of Mississippi
County of Hinds

Personally appeared before me, the undersigned authority in and for the jurisdiction aforesaid, Allen C. Thompson, who having been by me first duly sworn deposes and states on oath as follows, to-wit:

That he is Mayor of the City of Jackson, which position he has held for more than sixteen years; that Jackson is a clean progressive city with approximately one-third of its citizens members of the Negro race; that Jackson had been noted for its low crime rate and lack of racial friction prior to 1961 when the self-styled freedom riders made their visits to this City As the City rebuilt from the ashes of the Civil War, its white citizens occupied one area and its colored citizens chose to live to-

gether in another. As a result, there are large areas of the City occupied almost entirely by white people and other areas occupied exclusively by colored people. As this development took place, the City duplicated its parks, playgrounds, libraries and auditoriums in the white and colored areas. Prior to 1961 the members of each race customarily used the recreational facilities located near their homes. I believe that the welfare of both races would have best been served if this custom had continued. I fully realize that the City does not have the right to require or enforce separation of the races in any public facility. In 1961 at a time when racial tensions were inflamed by the visits of the freedom riders to Jackson, three Negroes filed suit to enjoin the City from denying them the right to use any and all recreational facilities owned and operated by the City. The Court declined to issue an injunction and granted a declaratory judgment to the effect that the plaintiffs were entitled to the free use of any and all recreational facilities provided by the City. *Clark, et al v. Thompson, et al* (decided May 15, 1962), 206 F. Supp. 539, affirmed 313 F.2d 637, cert. den. 11 L.Ed.2d 312.

Realizing that the personal safety of all of the citizens of the City and the maintenance of law and order would prohibit the operation of swimming pools on an integrated basis, and realizing that the said pools could not be operated economically on an integrated basis, the City made the decision subsequent to the Clark case to close all pools owned and operated by the City to members of both races. The City thereby decided not to offer that type of recreational facility to any of its citizens, and it has not done so and does not intend to reopen any of said pools.

All other recreational facilities have been completely desegregated and have been made available to all citizens of the City regardless of race. In 1961 the benches were

removed from the Livingston Park Zoo, but no other benches or tables have been removed from any other park, and all facilities of said parks and auditoriums have been and are available to all citizens of the City regardless of race.

Public rest rooms are maintained in City Hall, and same are available to all citizens regardless of race. Public rest rooms are not maintained in the Municipal Court Building for the reason that the efficient operation of said building does not permit the furnishing of these facilities for the general public.

Separate facilities and accommodations for white and Negro prisoners are maintained in the City jail. Such a separation in the jail is necessary for the maintenance of proper discipline and for the safety and protection of prisoners of both races. There is no discrimination between the races as to the quality of the facilities afforded.

.....

Sworn to and subscribed before me, this day of August, 1965.

Notary Public

My commission expires:

CERTIFICATE

The undersigned counsel of record for the defendants in the above styled and numbered action hereby certifies that a true copy of the foregoing affidavit has been this day personally delivered to Hon. Leonard H. Rosenthal, Attorney of Record for the plaintiffs.

This day of August, 1965.

.....

Of Counsel for Defendants

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1969

Hazel Palmer, et al.,
Petitioners,
vs.
Allen C. Thompson, Mayor,
City of Jackson, et al.,
Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of March, 1970, three copies of the Petition for Writ of Certiorari were mailed postage prepaid, to E. W. Stennett, City Attorney, Jackson, Mississippi, and to Thomas H. Watkins, Suite 800, Bankers Trust Plaza Building, Jackson, Mississippi, Counsel for the Respondent. I further certify that all parties required to be served have been served.

Alexandre J. Arene